No. 15131

United States
COURT OF APPEALS
for the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation, *Appellant,*

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant,*

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees.*

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant,*

v.

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STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

THE DOMINION OF CANADA, *Appellant,*

v.

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REPLY BRIEF OF APPELLANT-PETITIONER STATES STEAMSHIP COMPANY REPLYING TO THE ANSWERING BRIEF OF APPELLEES ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY AND THE DOMINION OF CANADA, HEREINAFTER REFERRED TO AS THE INSURANCE BRIEF

Appeal from the United States District Court for the District of Oregon.

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE WOOD,
LOFTON L. TATUM,
1310 Yeon Building,
Portland, Oregon;
BOGLE, BOGLE & GATES,
STANLEY B. LONG,
C. CALVERT KNUDSEN,
Central Building,
Seattle, Washington,
Proctors for Petitioner-Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-57

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Appeal from the United States District Court for the District of Oregon.

To the Honorable Judges of the above entitled court:

In addressing your Honors, we realize we are speaking to an Admiralty Court, familiar with ships, shipping and the seas, and that to such a court we do not have to stress the obvious or elaborate the detail. We confine ourselves to suggesting the fundamentals, ignoring the inconsequential, and endeavoring to keep this,—as its name implies,—brief.

PERILS OF THE SEA

Counsel argue that the storm was not a peril of the sea (pp. 10 to 21). They cite certain testimony of Captain McMunagle that the storm was not unusual or unanticipated, and that he had seen the same conditions three or four times before. This testimony, however, is contradicted by the *official records* of his own ship, the STONETOWN, which, as pointed out in our Opening Brief, pp. 45-6, show that in the whole period covered, only nine readings recorded waves of 45 feet or higher, and that of those nine, *seven occurred on the day of the PENNSYLVANIA'S loss, the readings being on a 3-hour basis, and extending for eighteen consecutive hours* (Exh. 92); and that the PENNSYLVANIA'S storm was the *only* time when waves of 45 feet or over were combined with a temperature of 32° F. or below (Exh. 91 and 92). (The effect on steel of freezing temperatures is known.) Furthermore Captain McMunagle himself was frank enough to admit, as pointed out in our Opening Brief (p. 28), that this storm was "as bad as you can get." If it is "as bad as you can get," it *must* be a peril of the sea.

Counsel next cite the testimony of Captain Mori of the KOTO MARU, to the effect that this was a "big storm," but that he had seen the same kind before. This testimony did not negative sea peril, for, as pointed out in our Opening Brief, a storm does not have to be absolutely unprecedented to constitute a peril of the sea. Regardless of that, the fact is that the official records contradict him.

Both of these men are further contradicted by the unimpeached and uncontradicted testimony of Mr. Danielson and Dr. Rattray that a search of the official records showed that this was the worst storm in the North Pacific in thirty years.

Counsel cite the fact that the CYGNET III, a Liberty ship, survived. True, she did. But it proves nothing. And her own captain testified it was the worst storm he had ever seen in all his years at sea. (Tr. 1657).

But of course we do not have to go as far as that. The classical definition of "perils of the seas," as stated by Judge Wallace in the Warren Adams, 74 Fed. 413, at page 415, still holds good:—

> "That term (perils of the sea) may be defined as denoting 'all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel; casualties which may, and not consequences which must, occur.' "

Of course as a defense, this may be swept away by a showing of negligence or unseaworthiness. But as a definition of "peril of the sea," it is perfect. The thing which caused the PENNSYLVANIA to founder was

water inside of her, particularly No. 2 hatch being full of water when the tremendous seas put the deck cargo adrift, tore off the tarpaulins and opened this hatch. Certainly it would be impossible to find a plainer "peril of the sea," or a plainer cause of loss.

The best review of the authorities which we have found defining perils of the sea is in The Keynor, 1943 A.M.C. 371, on pages 378-381 (cited also by counsel on page 29 of his brief).

After reviewing all these authorities the Court said:—

> "From these authorities it is clear that to constitute a peril of the sea the accident need not be of extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence."

In substance this is the same definition as in The Warren Adams.

STORM CENTER

On pages 21 to 25 of counsels' brief, they take exception to our statement that the PENNSYLVANIA was nearer the center of the storm than other ships. We rely on the synoptic charts to show that, and we think they do. Mr. Danielson's testimony is cited by counsel as contrary. But we do not think it is. In order to illustrate his theory that the storm remained stationary for a time, fed by cold air from Alaska, he drew a circle on Exhibit 101, showing a radius of about 2° or approximately 120 nautical miles, and put the center, of the *circle,* not the *storm,* at around 50° North to about 138° West, and

said that the storm would remain somewhere within this area for a specific period of time; but added that various analysists might analyze this at a slightly different point (Tr. 1303-4). All he was doing was indicating the general center of the storm as being somewhere within that circle, and we believe that circle overlaps the eye of the storm, as shown on the synoptic charts, although we do not have the charts in front of us to compare it.

The further testimony cited by counsel to the effect that Danielson said the extreme weather conditions would be further south (Tr. 1402) apparently refers, not to the seas, but to the air, wind velocity and turbulence, rain showers, snow showers, etc., possibly in the upper atmosphere where the cold jet was streaming in from Alaska. We still believe that, for what it may be worth, the PENNSYLVANIA, as shown by the synoptic charts, was nearer the center than any other ship, but we do not attach too much importance to it, for certainly the storm was bad enough wherever the center was.

THE LAW OF PERIL OF THE SEA AND THE EXCEPTIONS UNDER CARRIAGE OF GOODS BY SEA ACT OF 1936 AND THE CANADIAN WATER CARRIAGE OF GOODS ACT OF 1936

Counsel's brief argues this on pages 25 to 39. The substance of their argument is that a peril of the sea is not a good exception if the loss is also occasioned by a concurrent cause for which the shipowner is liable. This is correct and we accept it. The case of the MANCHURIA is a good example. But we do not accept counsels' further contention that the shipowner "has the burden of proving that the storm was the sole proximate

cause of the vessel's loss" (Br. p. 25). The true rule is that if the shipowner proves even prima facie peril of the sea as a cause of the loss, then the burden shifts to the cargo to prove some other contributing cause, as e.g., negligence or unseaworthiness. In other words, the shipowner having proved peril of the sea, does not have to negative all other causes. On the contrary, it is up to the cargo to prove some one of those other causes. See: Kalamazoo Paper Co. v. C.P.R., 1950 S.C.R. 356 (1950), 2 D.L.R. 369 (Supreme Court of Canada), Kurth Maltine Co. v. Colonial Steamship Ltd. (1953) Ex. C.R. 194 (Exchequer Court of Canada) and other authorities cited on page 10 of our opening brief.

There is nothing new about this. As long ago as 1851 Mr. Justice Nelson said,—"Hence it is that, although a loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff (here the consignee) to establish the negligence the affirmative lies upon him." Clark v. Barnwell (1851), 53 U.S. (12 Howard) 272, 280; 13 L. Ed. 985, 988. And if the issue be left in doubt or "if it may as well be attributable to 'perils of the sea' as to negligence, the plaintiff cannot recover." id. This is still the law, approved by this Court in The Nelson Traveler, 1938 A.M.C. 752.

It is strange that counsel cite on page 29 of their brief the Keynor case. For in that case the Court said:

> "I believe that the appellant has succeeded, and the trial Judge has so found, in establishing that there has been a peril of the sea. There is even more

> than a mere 'prima facie case.' It was then upon the respondent to disprove it, by proving negligence causing the loss—in this, it has totally failed." The Keynor, 1943 A.M.C. 371, 381.

We do not review the cases cited on pages 25 to 38 of counsel's brief. Some are Harter Act cases clearly inapplicable. None of them supports the contention that the shipowner must prove that peril of the sea was the sole cause of loss excluding all other causes. The shipowner having proved peril of the sea, the cargo owner must prove some other concurrent cause establishing liability, and if the issue is in doubt, as Mr. Justice Nelson said in Clark v. Barnwell, the cargo owner must fail.

PRESUMPTION OF UNSEAWORTHINESS

Counsel discusses this on pages 44-46 of his brief. We think this hardly needs a reply. Of course there are cases where a vessel suffers damage, or even sinks, without any adequate explanation, and naturally a presumption of unseaworthiness arises. It is a species of res ipsa loquitur. It is, however, only a presumption and can be refuted by contrary evidence of her seaworthiness.

The doctrine obviously has no application here, where the loss of the PENNSYLVANIA is fully explained by the terriffic storm which she encountered. The South Coast, 71 F. 2d 891, 893-894.

"EVIDENCE OF A DEFECTIVE HULL STRUCTURE"

This is counsel's heading on page 46 of his brief, the discussion continuing through to page 71. Since we have

discussed this in our two previous briefs, we reply now only briefly.

On pages 57 to 59 the brief states that the PENNSYLVANIA had wavy bottom plates. We are tempted to ignore this, since these plates had nothing whatever to do with the loss. They occurred intermittently between No. 2 and No. 5 (Tr. 2400), and there is not a shred of evidence or suggestion that they failed in any way. But, rather than leave the Court in the dark, we will explain them.

These plates were the same ones which the A.B.S. surveyors noted in their various reports and declared to be of no consequence and not affecting seaworthiness. Our own Coast Guard, Mr. Gilmour for Lloyds Underwriters, the representatives of the Government who sold the ship to petitioner, and everybody who ever examined her, agreed with them, and pronounced the ship seaworthy.

The deepest distortion was only ¾ of an inch, the average only ¼ (Tr. 2400).

Mr. D. P. Brown, whose testimony on pages 2784-2791, 2796-2799, and 2813, shows his wide knowledge of the subject, said this waviness did not affect the ship's seaworthiness "in any respect" (Tr. 2796).

Counsel say that where the distortion is greater than ⅜ of an inch, Lloyds Register of Shipping required strengthening of the tank tops. We inquire: "What of it?" The ship was classed in the American Bureau of Shipping, which does not agree with Lloyds on the point in question. Counsel's statement that the Bureau Veri-

tas, and the Netherlands Ship Builders Research Association require it is not borne out by the record. They apparently only had it under discussion. Neither is the statement that our Coast Guard required it in some districts, for any such slight waviness as the Pennsylvania had. Nor that the Maritime Administration has proposed it. Their proposal (apparently not carried out) related to strengthening *all* tank tops without regard to bottom waviness (Tr. 420-421). Of all the classification societies, Lloyds appears to be the only one (See the testimony of D. P. Brown [Tr. 2813]), and even it did not lay ships up for it, but only required it "as soon as possible" (Tr. 2405).

Since all this is unrelated to the loss we apologize to the Court for giving so much time to it.

On page 67, the Insurance Brief says the petitioner must come forward with "a specific and adequate explanation for the structural failure of the vessel allowing entry of water in No. 1 hold."

Not only is there no evidence that there were *any* "structural failures" at No. 1 hold, but, if there were, petitioner *has* come forward with the explanation,—the storm, a peril of the sea. Petitioner does not have to show *exactly how* the storm penetrated No. 1 hold. The law does not exact that, especially with all the crew dead and no survivor to testify. The admiralty is a practical system and recognizes the limitations of proof. It does not demand the impossible.

Even if this were not so, even if the crew had survived, all the petitioner would have to show would be

the terrific intensity and duration of the storm. Claimants would then have to prove unseaworthiness—a difficult job in face of the fact that the ship passed through Storm No. 1 unscathed, and battled Storm No. 2 for more than 20 hours before succumbing, during which she executed the most dangerous maneuver a ship can make in those conditions, turning around.

The leading case on the entry of seawater requiring explanation is The Folmina. It is there said: It "was not shown that the vessel encountered sufficient stress of weather to *warrant the inference* that it (the water came in because of the action of external causes" (emphasis supplied). The Folmina, 212 U.S. 354, 360, 53 L. Ed. 546 at page 550. Plainly the PENNSYLVANIA'S weather did "warrant the inference."

Incidentally, the hold was not "flooded" as counsel say. It was "taking water."

"EVIDENCE OF DEFECTIVE STEERING SYSTEM"

This is the heading on page 71 of the Insurance Brief. We went into this somewhat fully in our two previous briefs, and certainly do not wish to re-hash it now. That the storm would put an extra stress and strain on the steering gear is obvious. And equally obvious is it that any mechanical device may fail at times.

We reply, however, to counsel's criticism of our interpretation of the radiograms, where we said it was incorrect to say that the ship could not steer by any method. (See our Opening Brief, pp. 102-3).

When the message, sent at 1807 G.M.T., said "endeavoring to steer course of 110 degrees," it certainly meant that the master had *some* method of steering. Otherwise the message is senseless. Either he still had the regular gear but was handicapped in holding a true course of 110° by the tremendous seas, just as Captains McMunagle and Maeda were, or else he was using some alternate gear, presumably the hand-steering gear. The only other messages relating to this subject are the one sent at 1905 G.M.T., saying "down by head cannot steer," and the one at 2015Z saying "using hand steering." These later messages must be read in the light of the first. In the very first one, sent at 1807, the words "can't steer" are the same words as used in the later message. And yet in that first message the words "can't steer" are qualified by his statement that he is *endeavoring* to steer a course of 110°. We therefore think the reasonable interpretation is that he never was completely without steering ability, but at some stage had to fall back on hand steering.

On the effectiveness of hand-steering, compared with regular steering from the bridge, we refer the Court to Mr. Vallet's testimony as follows:

> "Q. Now, is there any emergency steering apparatus? If, for example, this electrical hydraulic motor that you described was out of commission for some reason or other, is there any other system?
>
> A. Yes, there is a hand pump, rotary pump, located in the steering engine room.
>
> Q. How does that work?
>
> A. Well, that merely pumps hydraulic fluid to the rams, and it just takes the place of the electric motor.

Q. In other words, to get the hydraulic pressure on the rams it has to be done by hand; is that the idea of it?

A. That is right.

Q. Then in order to maneuver the ship do you turn the same wheel?

A. The same wheel, yes.

A. So the hand work that is done in steering by hand, then, is the work of pumping the hydraulic fluid; is that the idea?

A. Yes.

Q. That pumping must be done by having a man in this engine room?

A. It would take several men.

Q. How many men would you say it would take?

A. Well, there is only room for about two men. It is extremely hard work, and a man couldn't keep it up for any length of time.

Q. In other words, if you got two or three men back there they would have to take turns at it to get anyplace at all; is that right?

A. That is right.

Q. As a matter of fact, that steering system by working the hydraulic pump wouldn't be very effective if you had heavy weather or mountainous seas, would it?

A. That is correct.

Q. You would not be able to keep a vessel out of the trough of a heavy sea, would you?

A. Probably not." (Tr. 2558-9)

This is confirmation of our interpretation that the messages only mean that when the regular gear temporarily failed he at once used the hand-steering gear, but that he could not steer with it as well.

Incidentally we may remind the Court that the time of sending the messages does not fix the time of using the gear at all. That use could fall anywhere between

the time limits of the messages.

Of course, all the evidence being in the radiograms themselves, and nowhere else, this Court is just as able to interpret them as was the Trial Court. The finding that the ship was not able to steer by "any method" was drafted by Government's counsel and adopted by the Trial Court without any discussion of the radiograms.

It may well be asked:—Was the steering gear the proximate cause of the loss at all? When it was fixed, the ship was still afloat. But she could not steer because the rudder was too far out of water. In that posture, what really sank the ship was the water in her holds. Did the steering gear cause that? It may be surmised. But there is no direct evidence of it, and the burden is on claimants to prove it as a cause of the loss.

We do not reply to counsel's suggestion that the 110° message does not indicate the ship had turned around. We think that is obvious since her previous course on the Great Circle Route was approximately 290°. The 110° message clearly indicates a 180° turn. (Our Opening Brief, p. 18.)

We just briefly mention the authorities cited by counsel. We hope the Court will read them. They have no resemblance to this case at all. The A.H.F. Seeger, 104 F2d 167, and The Meanticut-Bedford, 65 F.Supp. 203, are both cases where there was a definite, ascertained defect in the steering gear, and the ship, having pleaded inevitable accident, was required to furnish the strict and exacting proofs which the law demands to

sustain that defense. The Ionian Pioneer, 236 F.2d 78, was an old wreck of a ship ready for the scrap-heap, sustaining so many steering failures and other faults (without any exculpatory bad weather) as to be unique. (In view of counsel's predeliction for Lloyd's, it is interesting to note that she was classed in that Society.) The Court stated the rule on presumptions as follows:—

It said that cargo has the advantage of "a presumption of unseaworthiness existing at the beginning of the voyage, where machinery, gear, or appliances fail *shortly after the beginning of the voyage without accident, stress of weather,* or the like, furnishing an adequate explanation as a likely cause" (emphasis supplied) p. 80.

The Ionian Pioneer, leaving San Pedro Harbor on a quiet evening in those still waters, ran aground when she had hardly got started, because she could not steer (pp. 81-2).

We close this discussion of the steering gear by pointing out one very significant, and it seems to us, controlling factor:—*Not a single witness through all this long trial came forward to say that the type of steering gear on the PENNSYLVANIA, or the methods of inspecting it and testing it were in the slightest degree improper. The Government, largest claimant here, had all the benefit of the U. S. Coast Guard, the Navy and all the ships of the Maritime Administration. No single witness was produced from these or the whole American Merchant Marine to say that the inspections and tests of the steering gear, which counsel now urge to have been inadequate were in anyway faulty in the*

least degree. It is only counsel, who now, without any supporting evidence, make these suggestions, and, on the basis of them alone, ask this Court to disregard the evidence of all the practical and experienced men who had to do with the upkeep and maintenance of this ship.

"EVIDENCE OF THE UNSEAWORTHY CONDITION OF THE FORWARD HATCHES, THE INSECURE CARRIAGE AND STOWAGE OF FORWARD DECK CARGO"

Such is the heading on page 81 of the Insurance Brief.

We have discussed these matters fully in our two previous briefs (Opening Brief, pp. 109-122; Answering Brief, pp. 43-51). Our only comments now are these:—

Counsel is mistaken in saying that the Trial Court "found" that the taking off of the tarpaulins and No. 2 hatch filling with water were "the product of the unseaworthy condition of the forward hatches and stowage of cargo on forward deck" (Brief, p. 81). He repeats the same mistake on page 82, where he says that the evidence "supports the Court's *finding* that this condition (deck cargo and hatches) was a *factor of unseaworthiness, existing at the inception of the voyage,*" etc. (Emphasis supplied.)

As pointed out in our Opening Brief, at pages 119, 122, and again in our Answering Brief, at page 50, the Trial Court made no such finding at all. All he found was that the deck cargo came adrift taking the tarpaulins off the forward hatches, and that No. 2 was open and full of water. He did not say why. He found no fault with the

stowage, or the hatches (Finding IV). The obvious cause was the seas.

Our only other comment is to state the obvious physical fact that as long as the ends of the cross-battens were brought into juxtaposition over the center of the hatch, and there screwed up and tightened with the turnbuckles, it would not make any difference whether they were bent or not; and even the adverse witness, Huston, the carpenter, admitted that he could only recollect tightening two turnbuckles on No. 2 and No. 3 hatches, and then only about three times (Tr. 2086), which certainly is not unusual on a long voyage across the Pacific; and that he kept them tight at all times. Tr. 2807).

LATENT DEFECTS

Our argument on Latent Defects (Opening Brief, pp. 124-129), was in reply to claimants' assertion of notch-sensitivity in the vessel's hull,—not to complaints against the steering gear. (The incidental mention of the latter was merely a reference to the Trial Court's opinion wherein he said that all the alleged defects, which would of course include the steering gear, were "latent" and not "apparent." As our brief showed, we urged that if "latent" and not "apparent," then due diligence would not disclose them.)

Counsel say we did not plead "latent defects" in our petition. Of course not. We denied, and still deny, that there were *any* defects. Our petition stated that petitioner was without any "neglect, fault or negligence." Claimants denied this, and alleged, among other things, lack

of due diligence. These allegations and denials, of course, put in issue the defense of "latent defect," if it should come to light.

But regardless of this, as your Honors too well know, Admiralty Courts always allow parties to urge any defense, regardless of pleadings, which are not a surprise, and are warranted by the proofs.

We shall not re-argue that notch-sensitivity, if it existed at all, was a latent defect. We shall just take a quotation out of counsel's own brief, at page 95:—

> "A latent defect is one that could not be discovered by any known and customary test."

That notch-sensitivity perfectly falls within that definition is made plain by the uncontradicted testimony of D. P. Brown, Mr. Williams and Mr. Hechtman, all cited in our Opening Brief at pages 127-128.

"PETITIONER'S DEFENSE OF ERROR IN NAVIGATION"

This is the heading on page 97 of the Insurance Brief. Counsel mistakes us.

Petitioner claims that in turning around in those stormy seas, Captain Plover exposed his ship to dangers, recognized by all mariners, and that the very fact that the ship made the turn at all in those conditions, was proof of her seaworthiness; and that the damage she suffered (except the previous crack) was probably started during that turn, which, as Captain McMunagle said, could sink even a seaworthy ship. (Opening Brief, p. 81). That was the burden of our argument. We did not accuse Captain Plover of an error in navigation. He

was a competent captain, and is dead, and we make no reflection on him. We only said that the act of turning around was an act of navigation for which petitioner would not be liable. That is all.

DUE DILIGENCE

The remainder of the Insurance Brief is devoted to due diligence and the decisions applying it. This Court knows the law well, and we have covered the subject sufficiently in our previous briefs.

Respectfully submitted,

WOOD, MATTHIESSEN, WOOD & TATUM,
ERSKINE WOOD,
LOFTON L. TATUM,
1310 Yeon Building,
Portland, Oregon;

BOGLE, BOGLE & GATES,
STANLEY B. LONG,
C. CALVERT KNUDSEN,
Central Building,
Seattle, Washington,

Proctors for Petitioner-Appellant.